Nos. 87-1622, 87-1697, and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF PETITIONER STANLEY WILKINSON

DALE B. RAMERMAN *
RONALD T. SCHAPS
MICHAEL MIRANDE
BOGLE & GATES
2300 Bank of California Ctr.
Seattle, WA 98164
(206) 682-5151
Counsel for Petitioner Stanley Wilkinson

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does the Yakima Indian Tribe have the authority to control through comprehensive zoning the use of fee land located within both Yakima County and the Yakima Reservation when that land has been alienated pursuant to the federal policy of land allotment to Reservation residents who are not members of the Yakima Tribe, and when the land in question has previously been subject to Yakima County's zoning authority?

2. Does a federal court of appeals proceed properly under Fed. R. Civ. P.52(a), when it independently determines whether a tribe may exercise authority over the fee-owned land of non-members of the tribe despite district court findings that the factual predicates for the existence of tribal authority are absent?

3. May Congress, consistent with the Fifth Amendment to the United States Constitution, sanction a tribe's comprehensive regulation of the reservation fee land of non-members, when those non-members are disenfranchised on the basis of ancestry and cultural affiliation from participation in tribal government, and when they may not secure direct judicial review of tribal land use decisions?

LIST OF PARTIES

The petitioners are: Stanley Wilkinson, a non-member of the Yakima Tribe who owns and resides upon land located within both Yakima County and the Tribe's Reservation; the County of Yakima and its three County Commissioners, Jim Whiteside, Graham Tollefson and Charles Klarich; Richard F. Anderwald, the Director of Yakima County's Planning Department; and, Philip Brendale, a non-member of the Tribe who owns land within the Reservation. The respondent is the Confederated Tribes and Bands of the Yakima Indian Nation. Jim Gatliff and Dick Keller, who at the time of suit were prospective purchasers of a portion of petitioner Wilkinson's reservation land, were aligned as defendants-appellees below and have filed a notice of appearance in this matter.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1622, 87-1697, and 87-1711

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF PETITIONER STANLEY WILKINSON

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 828 F.2d 529 (9th Cir. 1987), and is reprinted in the Appendix to Wilkinson's Petition For A Writ Of Certiorari at page 3a.

The opinions of the District Court in *Whiteside I* and *Whiteside II* are reported, respectively, at 617 F. Supp. 735 and 617 F. Supp. 750, and are reprinted in the Appendix to Wilkinson's Petition For A Writ Of Certiorari at pages 108a and 33a.

The District Court's orally delivered Findings Of Fact And Conclusions Of Law in *Whiteside II* are unreported, but are reprinted at page 80a of Wilkinson's Petition For A Writ Of Certiorari ("W. Pet."), while its unreported oral opinion in *Whiteside I* is reprinted at page 40 of the Appendix to Brendale's Petition For A Writ Of Certiorari.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered a judgment and order on September 21, 1987 affirming the District Court's decision in *Whiteside I*, and reversing and remanding the District Court's decision in *Whiteside II*. (W. Pet. 3a.)

On January 13, 1988, the Court of Appeals for the Ninth Circuit entered an order denying the County of Yakima's timely filed petition for rehearing. (County of Yakima's Petition For A Writ Of Certiorari at 17-A.)

Petitioner Wilkinson invoked this Court's jurisdiction to review the Ninth Circuit's judgment pursuant to 28 U.S.C. § 1254(1). This Court granted Wilkinson's petition for certiorari on June 20, 1988. On that same date, this Court also granted petitioners Brendale and the County of Yakima certiorari. It then consolidated these matters, bringing both *Whiteside I* and *Whiteside II* before this Court. (Joint Appendix ("Jt. App.") 10, Docket Entry of June 27, 1988.)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

Fifth Amendment To The United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Treaty With The Yakima, 12 Stat. 951, *reprinted in* W. Pet. 172a.

The Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.*, *reprinted in* W. Pet. 194a.

Federal Rule of Civil Procedure 52(a):

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts, without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court fol-

lowing the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

A. Introduction

These consolidated cases present the question of whether the County of Yakima, Washington,[1] or the Yakima Indian Tribe has the authority to regulate the use of land owned in fee by non-members of the Tribe, when that federally allotted land is located in Yakima County but within the exterior boundary of the Yakima Indian Reservation. Petitioner Wilkinson's case (*"Whiteside II"*), concerns the conflicting claims of County and Tribe to the authority to zone a piece of his fee land located on the edge of an approximately 350,000 acre portion of the 1.3 million acre Reservation termed the "open area". That region, approximately half owned in fee, has a population that is 80% non-Indian. The County has exercised regulatory jurisdiction over non-trust land in the open area for a hitherto uninterrupted period of thirty-five years. Petitioner Brendale's case (*"Whiteside I"*), concerns fee land he owns within the other two-thirds of the Reservation. That region is termed the "closed area," and is primarily uninhabited timber acreage and range land. The County has asserted jurisdiction over closed area fee land as well.

The District Court held in separate actions that the County possessed exclusive zoning jurisdiction over the Wilkinson property, and that the Tribe held that authority over Brendale's land. In a decision embracing both cases, the Ninth Circuit Court of Appeals affirmed the

[1] Yakima County is a political subdivision of the State of Washington. *See* Wash. Const. Art. XI. The County exercises its land use authority pursuant to the State Constitution and state land use planning statutes. *See* Wash. Const. Art. XI, § 11; RCW Ch. 36.70.

result as to Brendale, but reversed the Wilkinson ruling. It held that the Tribe had the sovereign authority to zone comprehensively all of the land within its Reservation. By so ruling, the Ninth Circuit inappropriately expanded Tribal authority beyond self-government to include power over the constitutionally protected interests of non-members who, although citizens residing within these United States, may not participate in Tribal government, nor secure direct judicial review—in federal, state or Tribal Court—of Tribal land use decisions affecting their property.

B. The Treaty With The Yakima and the Evolution of the Reservation

In 1855, Isaac Stevens, the governor of the Territory of Washington, negotiated a treaty between the United States and fourteen separate bands of Indians that occupied lands extending from Mt. Rainier in the west to the south-central portion of what is now the State of Washington. (Wilkinson's Petition For A Writ Of Certiorari ("W. Pet.") 172a-177a.) For purposes of the Treaty, the fourteen tribes and bands joined together and were to be considered the Yakima Indian Nation ("Tribe" or "Yakimas"). (W. Pet. 173a-174a.)

In the Treaty, the Yakimas ceded to the United States certain of their lands and acknowledged their dependence upon the federal government. (W. Pet. 174a-177a, 187a.) The Tribe did, however, reserve from the ceded lands a tract that was to be

> set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

(W. Pet. 178a.)

The Treaty provided for the allotment of land to members of the Tribe. (W. Pet. 186a).[2] The Treaty also identified certain limits on the Tribe's ability to act in the criminal and civil spheres. In the same treaty article in which they acknowledged their dependence on the United States, the confederated tribes pledged themselves not to commit "depredations" upon the property of United States citizens and to pay compensation for any Indian taking or destruction of non-Indian property. (W. Pet. 187a.) The Tribe agreed "not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." (W. Pet. 188a.) Further, the Tribe enlisted federal assistance in excluding the use of alcohol from the Reservation. (W. Pet. 188a-189a.)

The Senate ratified the Treaty With The Yakima on March 8, 1859. President James Buchanan signed it on April 18, 1859. (W. Pet. 191a-193a.)

The allotment of Reservation land commenced soon after the Treaty became law:

> Article VI of the Treaty provided authority whereby agents could allot land. This system of granting farms to individuals was employed almost from the beginning.

---

[2] The Treaty shows that it also contemplated the possibility of sale of allotted land to non-Indians. Article VI of the Treaty With The Yakima, dealing with allotments, incorporates by reference the sixth article of the Treaty With The Omaha. (W. Pet. 186a). That cross-referenced article reflects the federal policy of encouraging Indian assimilation, but also provides that if an allottee neglected the "pursuits of industry" or resumed to "rove," the federal government could deem his allotment abandoned and, under certain circumstances, sell it for the Omaha's benefit pursuant to "such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States." Article VI, Treaty With The Omaha, 10 Stat. 1043 (1854), *reproduced in* 2 C. Kappler, *Indian Affairs, Laws And Treaties* at 612-613 (1904).

(C. Relander, *Strangers On The Land* (1962) at 58. The portion of this volume that addresses the allotment process appears in the District Court record as Exhibit 248 ("Ex. 248"), *see* Transcript Of Proceedings in *Whiteside II* ("Tr.") 556, 557.) In 1871, Felix Brunot, the President of the first board of Indian commissioners concerned with the Yakimas, visited the Reservation and recommended the further use of allotments. (Ex. 248 at 59.) He also recommended that allotted land be inalienable for two or three generations. (*Id.*) Even at that early date, therefore, sixteen years before the passage of the Allotment Act, Feb. 8, 1887, c. 119, § 2, 24 Stat. 388, federal officials contemplated that in the usual course allotted land would eventually be alienable. (Ex. 248 at 59.)

Allotment proceeded on the Reservation but did not begin in earnest until after passage in 1887 and subsequent amendment in 1892 of the Allotment Act. (Ex. 248 at 59-60; W. Pet. 194a-214a.) These Congressional enactments changed the Reservation. Federal records show that as of December 1, 1902, the Reservation contained 171,220 acres of allotted land. 1 C. Kappler, *Indian Affairs, Laws And Treaties* ("*Kappler*") (1904) at 1046. "By 1905 a total of 2,484 allotments had been issued. In 1914 when the rolls were closed 440,000 acres had been allotted to 4,506 individuals." (Ex. 248 at 60.) The allotments arose not just pursuant to the Treaty and the Allotment Act, but also under the authority of several statutes providing specifically for the sale of land within the Yakima Reservation. *See, e.g.*, Act of December 21, 1904, c. 22, 233 Stat. 595 (providing for the sale of surplus and unallotted Reservation land) & Act of March 6, 1906, c. 518, 34 Stat. 53 (providing for the sale of surplus, unallotted and allotted land), *reprinted respectively in* 3 *Kappler* at 110 & 159 (1913).

During this same period, the Reservation saw increased development and non-Indian settlement of allotted

land. The towns of Wapato and Toppenish, located within the borders of the Reservation, began their ultimately successful efforts to become incorporated cities. These efforts included the private marketing of platted fee land. (Ex. 248 at 64.) For both cities, the record reflects that the non-Indian developers perceived that the allotment, sale, platting and re-sale of land, and the incorporation of cities, would lead to "police protection" and the non-Indian (or non-federal) control of alcohol regulation. (Ex. 248 at 64.)

Congress further encouraged non-Indian settlement on the Reservation by early providing for Indian leasing to non-Indians of allotted land. *See, e.g.*, Act of March 1, 1899, c. 324, 30 Stat. 940, *in* 1 *Kappler at* 686 *and* Act of May 31, 1900, c. 598, 31 Stat. 246, *in* 1 *Kappler* at 701 (both providing for the Indian leasing of allotted land). Congress has also pursued consistently a program to irrigate land within the Reservation to make it attractive to Indians and non-Indians for farming. *See, e.g.*, Act of July 23, 1894, c. 152, 28 Stat. 118 *in* 1 *Kappler* at 516; Act of May 24, 1922, c. 199, 42 Stat. 552, *in* 4 *Kappler* at 337, 357 (1929); Act of September 26, 1961, Pub. L. 87-316, 75 Stat. 680, *in* 6 *Kappler* at 946 (providing for development of irrigation for Indian and non-Indian water users).

With the allotment process came local governmental presence on the Reservation. Congressional action illustrates at least one example of the federal awareness of local governmental provision of services within the Yakima Reservation. The example concerns the public schools in the City of White Swan, which is located in what is now the closed area of the Reservation. Article V of the Treaty required the United States to establish schools on the Reservation (W. Pet. 182a-183a); it is apparent that by 1935 Congress perceived cooperation with established local authorities to be the best method of satisfying this obligation. On June 7 of that year, Congress authorized

the expenditure of federal funds "for the purpose of *cooperating* with White Swan School District, Numbered 88, Yakima County, Washington for extension and improvement of public school buildings", the condition for such funding being that Indian children be permitted to go to these public schools on the same terms, except for tuition, as non-Indian children. *See* Act of June 7, 1935, c. 197, 49 Stat. 330 (emphasis added), *in* 5 *Kappler* (1941) at 428.

It is against this background that the Tribe and the County took the steps that eventually lead to the Wilkinson and Brendale cases.

C. The Current Character Of The Reservation

1. *The Closed Area*

In 1954, the Tribe declared that the western two-thirds of the 1.3 million acre Reservation—about 807,000 acres, of which 740,000 are in Yakima County—was "'to remain closed to the general public'". (W. Pet. 114a.) Since that date, the Tribe has restricted access to the closed area to members of the Tribe and those holding permits from the Tribe or the Bureau of Indian Affairs ("BIA"). (W. Pet. 115a-116a, 128a.)

The allotment process had made some lasting in-roads into this area of forest and range land. Of the 740,000 acres of closed area land in Yakima County, about 25,000 are held in fee, leaving approximately 715,000 acres of Tribal trust land in the closed area within the County. (W. Pet. 128a-129a.) United States Highway 97 crosses a portion of this region. (W. Pet. 114a.) Other roads into the closed area are maintained by the BIA. (*Id.*) In 1972, the BIA restricted the use of its roads to those otherwise permitted to enter the closed area. (W. Pet. 115a.)

The Tribe derives 90% of its income from timber operations conducted in the closed area. (Tr. 122-124; W.

Pet. 136a.) To the extent those operations involve fee land, the record in *Whiteside I* reflects that they are subject to State regulation under Washington's Forestry Practices Act. (Transcript of Proceedings in *Whiteside I* ("Br.Tr.") at 606.)

Petitioner Philip Brendale owns 160 acres of land inside the closed area. Brendale, who is part Indian but apparently of insufficient blood to be enrolled as a member of the Tribe, inherited his fee land from his mother in 1972; she had acquired her patent for the allotted land in 1963. (W. Pet. 123a-124a.)

2. *The Open Area*

The other one-third of the Reservation is termed the open area. That region, which embraces Wilkinson's property, consists of approximately 350,000 acres (W. Pet. 83a), about half of which is fee-owned (W. Pet. 40a). About 25,000 people live in the open area. Eighty percent of those residents are non-Indian. (Tr. 499; W. Pet. 51a.) The open area includes the incorporated cities of Harrah, population 345; Toppenish, population 6,575; and Wapato, population 3,310. (Tr. 538; W. Pet. 51a.) *See generally*, Ex. 200, Jt. App. 79; Tr. 28, 29, 344-346.

The open area plays a significant role in Yakima County's primarily agricultural economy. Yakima County contains ¼ of the irrigated land in Washington, and in production is one of the top 20 farm counties in the United States. (Tr. 416-417; Ex. 244 at 1-2, Tr. 420, 424, 425.)[3] A little less than ⅓ of that production is attributable to land within the Reservation, which contains about 143,000 of the 330,000 irrigated acres in Yakima County. (Tr. 416-417; Ex. 244 at 1.) Of the 143,000 irrigated acres within the Reservation, 63,179 are owned in fee by non-members of the Tribe, and 67,466 are

[3] These and the immediately following agricultural statistics are based on figures from 1980-83, which were used in the trial court proceedings of 1984. (*See* Ex. 244.)

leased to non-members, leaving about 12,355 acres farmed by Indians. (Tr. 422 & 418.) The irrigated Reservation fee land owned and farmed by non-members yields greater than 50% of the agricultural income attributable to lands within the Reservation, even though it comprises less than 50% of the Reservation's irrigated acreage, because it is planted in permanent crops, such as apples. (Tr. 422-23.)

The County of Yakima maintains close to five hundred miles of public roads in the open area, and provides public education for both Indian and non-Indian children residing on the Reservation. (W. Pet. 52a, 88a; Tr. 144-146.) The County provides police protection on the Reservation. (Tr. 286, 295, 547.) It also provides all Reservation residents with a full array of social and health services, including programs concerned with recreation, mental health, alcoholism, drug abuse and youth protective services. (Tr. 546-547.) The County provides legal services, such as indigent defense, and such other services as those related to the conduct of local and national elections. (*Id.*) At the time of Wilkinson's trial, the County collected property tax on deeded, but not trust land within the Reservation. (Tr. 548.)[4]

The Tribe also provides governmental services in the open area. The Tribe provides police protection in cooperation with Yakima County. (Tr. 286, 291.) The Tribe also maintains a range of social service and other programs. (Tr. 126-130.) As a then member of the Yakima Tribal Council testified, however, while theoretically open to all, those programs actually serve only Indian residents of the Reservation. (Tr. 143-144.)

[4] On May 10, 1988, Judge Alan A. McDonald of the Eastern District of Washington entered a judgment precluding the County from taxing Reservation fee land owned by Tribal members. *Confederated Tribes And Bands Of The Yakima Indian Nation v. County of Yakima, et al.*, No. C-87-654-AAM. That case is on appeal to the Ninth Circuit. Dkt. #88-3926.

All adult citizens of Yakima County, whether Indian or non-Indian, and whether or not resident on the Reservation, are eligible to register and vote in County elections. Only adult enrolled members of the Tribe are eligible to participate in Tribal elections. (Tr. 169.)

D. County And Tribal Land Use Regulation In The Open Area

There are significant procedural and substantive distinctions between County and Tribal land use regulation.

1. *County Regulation*

Yakima County regulates all fee land within its borders except that contained within incorporated cities. (Tr. 545, 442-446.) It does not regulate Tribal trust land. (W. Pet. 47a; Tr. 526-529.) Yakima County began regulating the use of land within its borders in 1946 under a temporary zoning resolution. (W. Pet. 43a; Tr. 437.) In 1965, the County adopted its first zoning law. (W. Pet. 43a.) In 1972, it adopted its first comprehensive zoning ordinance, which was in substance readopted in 1974 after it was struck down for a procedural defect. (*Id.*) The County has sub-area plans to coordinate development in the cities of Toppenish, Harrah and Wapato. (Tr. 443-444.) The Tribe participated in preparing the Toppenish and Wapato plans. (Br.Tr. 467.) In 1981, the County adopted a rural land use plan and in 1982 it adopted a new, two-tier scheme of agricultural zoning mandating lot sizes of either 40 or 20 acres. (Tr. 450; W. Pet. 44a-45a.) The County Code also provides for a zone called "General Rural," which allows for subdivisions of lots averaging one acre in size. (W. Pet. 45a-46a.) The County has a comprehensive subdivision ordinance. (Tr. 453.) The County's goal in this regulation is the preservation of agricultural land through the encouragement of clustered development around cities. (Tr. 442-443; W. Pet. 45a.)

Since 1974, pursuant to State law, the County has had a shorelines master program regulating the use of all

shorelines within the County, including those of the Yakima River and Ahtanum Creek on the Reservation. (Tr. 495-496.) In 1974, the County began participating in the federal flood insurance program, which allows all Reservation residents of deeded land—both Indian and non-Indian—to participate in that scheme. (Tr. 496-497; W. Pet. 46a.) Also, pursuant to Washington's Environmental Policy Act, RCW § 43.21C, the County requires environmental review prior to approval of land use decisions. (W. Pet. 46a-47a.) In implementing environmental standards, the County has provided notice to the Tribe as a "consulted agency" on all land use questions with potential environmental implications for the Reservation. (Tr. 494-495.)[5]

Those aggrieved by County land use decisions have a right to an administrative appeal and judicial review. (*See* Ex. 212, Section 15.13.090, TR. 344.)

The record shows the County's history of regulating deeded land on the Reservation. For example, since 1965, the County has processed 148 short plats for land on the Reservation, and has processed fourteen long plats on such land since 1970. (Tr. 455 & 457.) In fact, the evidence shows that the Tribe submitted for County processing a long plat application for some of the Tribe's Reservation land. (Tr. 455.) Since 1972, the County has issued 780 building permits for on-Reservation construction, and since 1974, it has processed 44 special use permit files, nineteen variances, and eleven rezoning applications concerning fee land within the Reservation. (Tr. 498, 538.)

---

[5] Under the regulations implementing Washington's Environmental Policy Act, the agency with the main responsibility for performing environmental review of a proposal is to consult other agencies with jurisdiction *or* expertise in a given matter for assistance. Such an assisting agency is a "consulted agency" under State law. *See* WAC 197-11-724. *See also* WAC 197-11-500(2) (authorizing lead agency contact with a consulted agency).

2. *Tribal Regulation*

The Tribe also asserts land use jurisdiction over the Reservation but, in contrast to the County (which does not zone Tribal trust land), asserts that authority over all land, whether or not owned by the Tribe. (Tr. 117, 188; Ex. 6, Tr. 28, Jt. App. 38.) In 1970, the Tribe adopted its first zoning ordinance, which was modeled on Yakima County's then existing code. (W. Pet. 40a.) In 1972, the Tribe adopted its currently effective Amended Zoning Ordinance. (W. Pet. 41a.) This ordinance is patterned after the County's earlier adopted 1972 Code. (Tr. 193-194.) The Tribe's code contains one zone—"agricultural"—for farm land, which requires a minimum lot size of five acres. (W. Pet. 42a; Jt. App. 56-59.) As applied in the open area, the Tribal Code, in harmony with the County code, has as its primary purpose the preservation of agricultural land. (W. Pet. 92a-93a; Jt. App. 39.)

Applications under the Tribe's ordinance are handled by a zoning administrator and a Board of Adjustment comprised of Tribal Council members. (Tr. 115, 185; Jt. App. 47, 49-54.) There is no right to direct judicial review—either in Tribal, state or federal court—of Tribal zoning decisions. (Tr. 158-159; Br.Tr. 184.) The Tribe's code leaves no room for doubt on this matter; it equates judicial review with sovereign immunity. Section 10 of the Tribal ordinance, which addresses an aggrieved party's access to judicial review of land use decisions, reads in its entirety:

> APPEAL FROM THE BOARD OF ADJUSTMENT
>
> Nothing in this ordinance shall be construed to be a waiver of sovereign immunity by the Yakima Indian Nation, and its officers and agents.

(Jt. App. 54.) Despite this lack of judicial review, the Tribe's zoning ordinance also provides that non-complying owners of fee land can be expelled from the Reservation:

> All uses of property not in conformity with this resolution shall be enjoined and in extreme cases the violators excluded from the Yakima Indian Reservation.

(Jt. App. 56.)

The Tribe has issued a zoning map showing its regulatory scheme. According to its ordinance, that map is an integral part of the Tribe's zoning code (Jt. App. 39-41) but, as a then member of the Tribal Council admitted at trial, a landowner cannot discern from reading that map how his property is zoned. Rather, one must visit the Tribal zoning administrator to secure that information. (Tr. 200-201. *See also* Tr. 454-455.)

The Tribe does not have a subdivision ordinance. In fact, up to the time of trial the Tribe, on an *ad hoc* basis, had approved every sub-division request that had come before it. (Tr. 453, 198, 171.) The Tribe has no formal environmental review process relevant to land use decisions. (Tr. 198-199.) The Tribe allows building in flood plains, and does not participate in the federal flood insurance program. (Tr. 205-206, 497.)

The record shows the Tribe's history of administering its zoning code in the open area. Since 1972, it has processed 883 land use applications and 75 variances. Three hundred and seventeen of these applications were submitted by nonmembers of the Tribe and concerned deeded land. (Tr. 118.)

In applying its ordinance to the open area, the Tribe is on record as thus far *choosing* not to exercise the power it claims over the incorporated municipalities of Harrah, Wapato, and Toppenish. (Tr. 163-164, 195-196. *But see* Ex. 8, Tr. 28, 195-196—the Tribe's Comprehensive Plan shows Tribal zoning of these cities.) As a Tribal Council member testified before the District Court:

> The Tribe *up to now* has not *opted* to actively pursue zoning and regulatory authority within city limits on the reservation for towns like Wapato and Toppenish.

(Tr. 117, emphasis added.) (*Cf.* Tr. 147-148—the Tribe asserts a similar unilateral power over certain water sources.)

Along with its zoning ordinance, the Tribe has pursued its land use efforts within the Reservation through repurchasing deeded, fee patent land and converting it back into Tribal trust status. (Tr. 109-110. *See also* Tr. 317.) The Tribe has expended about $54 million on this effort. (Tr. 110.)

E. Wilkinson's Property And The Decisions Below

Stanley Wilkinson is a non-Indian. He resides on the Reservation and owns in excess of 100 acres in Yakima County on the Reservation in the open area. (Tr. 519.) His fee ownership derives from the federal allotment policy of the late nineteenth century. (*See generally* Ex. 248.) The present dispute involves a portion of Wilkinson's 100 Reservation acres. As the District Court described it, the land central to *Whiteside II* is a

> 40 acre tract of fee land in the extreme north-east corner of the Reservation. The land is approximately three-quarters of a mile south of the Reservation's northern boundary. The parcel is situated on the northern slope of Ahtanum Ridge, overlooking the Yakima Municipal Airport (1½ miles to the north) and the City of Yakima (3 miles to the north). Wilkinson's property is bordered to the north by trust land and to the east, south and west by fee land. Currently, the property is vacant sagebrush land.

(W. Pet. 47a-48a (footnote omitted). *See also* W. Pet. 51a.)

Wilkinson's land is separated from the vast majority of the Reservation by Ahtanum Ridge, which rises to over six hundred feet directly south of his land. (Jt. App. 79.) On the geographically distinct north side of Ahtanum Ridge, Wilkinson is one of about 484 residents, 10% of whom are Indian. (Tr. 499-500.) Wilkinson owns an orchard. (Tr. 177). It, as well as several residences, is located near to that portion of Wilkinson's property he wishes to develop. (Tr. 177, 179, 231-232, 521.) There is an Indian cemetery 1.5 miles from Wilkinson's land. (Tr. 342.)

As part of its regulation of all fee land in Yakima County, the County zoned Wilkinson's land. (W. Pet. 44a.) So did the Tribe. (Tr. 117.) These designations conflict. The County zoned Wilkinson's land "General Rural," the Tribe "Agricultural." (W. Pet. 42a, 44a.)

In 1983, Wilkinson applied for and obtained the County's preliminary approval to subdivide a portion of the forty-acre tract in question, which he desired to convey to Messrs. Gatliff and Keller. (W. Pet. 34a, 47a-48a.) He wished to subdivide 32 of those 40 acres into 20 residential lots ranging in size from 1.1 to 4.5 acres. (W. Pet. 48a.) The Tribe's ordinance, which proscribed lots of less than five acres on the Wilkinson property, prohibited this subdivision absent a variance. (Tr. 117.)

The Tribe filed a timely appeal of the County's decision to the County Board of Commissioners, and urged that the County did not have jurisdiction over Wilkinson's land. After a hearing, the Board of Commissioners asserted jurisdiction and approved Wilkinson's proposed land use. (W. Pet. 49a-50a.)

In response, the Tribe, pursuant to 28 U.S.C. §§ 1343 and 1362, commenced this litigation (*"Whiteside II"*) in the United States District Court for the Eastern District of Washington on October 28, 1983. (Jt. App. 26.) The Tribe joined as defendants Yakima County, the Yakima County Commissioners (Jim Whiteside, Graham Tollefson and Charles Klarich), the Director of Yakima County's Planning Department (Richard Ander-

wald), Stanley Wilkinson, and Jim Gatliff and Dick Keller, the prospective purchasers of Wilkinson's land. (Jt. App. 28.) Along with other relief under 42 U.S.C. § 1983 and Washington's Environmental Policy Act, the Tribe sought "a declaratory judgment declaring the rights of the parties regarding land-use and entry regulations within the exterior boundaries of the Yakima Indian Reservation . . ." (Jt. App. 35.)

At the same time it was pursuing this action concerning its authority over open area land, the Tribe was also seeking a declaration of its regulatory power over all land within the closed area of the Reservation. On September 12, 1983, it had filed the federal court action of *Yakima Indian Nation v. Whiteside* ("*Whiteside I*"). (Jt. App. 13.)[6] That case concerned whether the Tribe had authority to preclude petitioner Brendale's proposed development of his 160 acre tract of closed area fee land. (Jt. App. 15-16; W. Pet. 123a-124a.)

In *Whiteside II*, after a trial on the merits, the District Court rejected the Tribe's claim to "paramount and exclusive" (W. Pet. 35a) land use jurisdiction over Wilkinson's property. It so ruled on the basis of this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). In reaching its judgment that the Tribe was "without the authority to exercise regulatory jurisdiction over Wilkinson's 'Open Area' fee land" (W. Pet. 67a), the District Court made the following crucial findings of fact that remain undisturbed after the Ninth Circuit's review: First, it found that Yakima County's zoning scheme is more protective of open area agricultural land than is the Tribe's zoning ordinance.[7] Second,

[6] Wilkinson attempted unsuccessfully to intervene in *Whiteside I*. (Jt. App. 1, District Court Docket Entries 58 & 83.)

[7] A good deal of the testimony at trial was dedicated to this issue. The conflict in the testimony was centered upon whether the County's ordinance, which in its "exclusive agriculture" and "general agriculture" zones require respectively 40 and 20 acre lot sizes, was more protective of agriculture than the Tribe's single agricultural zone classification mandating a minimum lot size of five acres. (W. Pet. 42a, 44a-46a, 53a; Tr. 51, 54, 467, 473-474, 489.) Although in this particular instance the Tribe's five-acre requirement for Wilkinson's property initially appeared more restrictive than did the County's "General Rural" designation reqiuring only one acre lots, the evidence indicated the contrary. The testimony of Tribal Council members clarified that the Tribal zoning scheme created no bar to the subdivision of *all* Reservation agricultural land into five acre plots, and that the Tribe had even granted variances for plots of less than five acres. (Tr. 171, 210.) Also, the *Tribe's* expert testified on direct examination that the Tribe's five acre agricultural lot size did not appear to be a good size to protect agriculture. (Tr. 54.) Indeed, he also opined that the only thing preventing wholesale subdivision of all Reservation land into agriculturally inviable five acre plots was *State* law. (Tr. 72-74.) The Court apparently credited this testimony, and the testimony of the County's land use expert (Tr. 460-490), in reaching its finding of fact on this issue.

it found that the Tribal land near Wilkinson's property was not a significant source of food for Tribal members, and therefore that Wilkinson's proposed land use did not threaten a Tribal food source. Third, it found, in light of the Tribe's reliance on its closed area timber income, that the Wilkinson project did not threaten the Tribe's economic security. (W. Pet. 53a, Findings of Fact 9-11.)

The District Court also found that the County's regulation of Wilkinson's fee land would not hinder the Tribe from exercising its power over trust land, and thus that the Tribe's political integrity was not endangered. (W. Pet. 54a, Finding of Fact 14.) In its oral opinion the District Court stated unequivocally:

> I find that there is *no evidence whatsoever* presented in this case to be the basis for a finding that the exercise by Yakima County of its zoning jurisdiction over the deeded land in the Open Area would interfere with the political integrity, economic security, or health or welfare of the Tribe.

(W. Pet. 99a, emphasis added.)

The record upon which these findings were based reflects an important, recurring theme of the Tribe's presentation. During the trial of *Whiteside* II, the Tribe's witnesses, in asserting the need for exclusive Tribal zoning authority, returned repeatedly to the perceived necessity of reversing the effects of the federal allotment policy. Thus, for example, Tribal Council member Washines spoke of the importance of the Tribe's commitment to the repurchase of fee patent land. (Tr. 109-110.) Elmer Schuster, a Tribal member owning land contiguous to Wilkinson's, testified as to the traditional value of land within the Reservation by stating his family's long-standing opposition to the allotment process. (Tr. 301.) Similarly, Rudy Saluskin, another Tribal member holding an interest in land near to Wilkinson's, recounted and endorsed the opinion held by his father that the allotment process was harmful to the Tribe because it allowed non-members to establish a presence on the Reservation. (Tr. 318. *See also* Tr. 109-110, 317 (Tribal land repurchase program designed to acquire deeded land and return it to Tribal trust status).)

The District Court was very sensitive to these considerations. On no less than three occasions during the course of his oral decision the District Court noted these concerns sympathetically:

> In utilizing the *Montana* standards, I am not unmoved by the desire of the Tribe and the Members thereof to have its treaty lands returned to it, but that does not, in my opinion, justify my finding that such a desire constitutes a threat to the political integrity, the economic security, or the health or welfare of the Tribe and its Members. (W. Pet. 96a.)
>
> * * * *
>
> I am unable to find that the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it is such as interferes with the political integrity, the economic security, or the

> health or welfare of the Tribe and its Members. Once again, that is a matter for the Legislative Branch, not the Judicial Branch to determine. (W. Pet. 98a.)
>
> * * * *
>
> I suggest to the Yakima Indian Nation that despite your sincere belief that all of the land within the exterior boundaries should be returned in accordance with the Treaty of 1855, that that may be some time in coming. I think you recognize that that is a matter for the Legislative Branch of this Government to decide; to-wit, Congress. (W. Pet. 101a.) (*See also* W. Pet. 12, n.7.)

Notwithstanding these sincere concerns, the Court felt constrained to reach its decision in light of the controlling legal considerations: Congressional enactment and implementation of the Allotment Act, and the current pattern of land ownership on the Reservation. It stated that the allotment policy had modified the Treaty With The Yakima, and that this modification "is not a matter that I have the power to rectify. That is a matter for congressional enactment, for the Legislative Branch to rectify if they determine that appropriate action should be taken." (W. Pet. 89a-90a.) Of the non-Indian homesteading that resulted from the allotment policy, the Court stated "[t]hat is history; that happened" (W. Pet. 90a), and soon thereafter the Court pointed to a map (Ex. 200, Jt. App. 79), illustrating the checkerboard pattern of fee and Tribal trust land tenure on the Reservation, and stated that it "reflects exactly the history of the dealings by the United States' Government with the Indian people . . . ." (W. Pet. 91a.)

The District Court reached a different result in *Whiteside I*. The Court determined that the closed area case was factually "strikingly distinct" from Wilkinson's open area matter. (W. Pet. 81a.) It held that the Tribe had exclusive authority to regulate the use of Brendale's closed area fee land. (W. Pet. 108a, 159a.)

The Ninth Circuit Court of Appeals affirmed *Whiteside I* but reversed *Whiteside II*. As to Wilkinson's case, that Court conceived the relevant analysis to consist of a two-step process. First, relying on *Montana v. United States*, 450 U.S. 544 (1981), it assessed whether the Tribe possessed any authority to zone non-Indian fee land within the Reservation's borders. (W. Pet. 16a-24a.) Much as the Ninth Circuit Court of Appeals erroneously approached the Crow Tribe's authority in *United States v. Montana*, 604 F.2d 1162 (9th Cir. 1979), *rev'd*, 450 U.S. 544 (1981), the Ninth Circuit here ruled that the Yakima Tribe derived its sovereign power over all fee land within its Reservation from two sources: "implicitly from its status as a dependent sovereign" and "explicitly from the Treaty with the Yakimas." (W. Pet. 17a.) *Cf. Montana v. United States*, 450 U.S. 544, 557 (1981). Having concluded that the Tribe did possess such power, the Court remanded the case to allow the District Court to balance the interests of the Tribe and the County to determine which entity's concurrent authority over open area land would ultimately control in this case. (W. Pet. 24a-25a, 29a-31a.)[8]

In reversing *Whiteside II*, the Ninth Circuit did not hold that the federal policy of "recognizing Indian sovereignty and encouraging tribal self-government," (W. Pet. 15a) was preemptive of County regulatory authority over deeded land on the Reservation. (W. Pet. 14a-16a.) *Cf. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Further, it did not set aside the District Court's underlying findings of fact. *See supra* at 18-19.

---

[8] This finding of concurrent jurisdiction parallels the scheme of dual authority the Ninth Circuit formulated, and this Court struck down, in *United States v. Montana*, 604 F.2d 1162, 1172 (9th Cir. 1979), *rev'd*, 450 U.S. 544 (1981). *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983) ("concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation").

Rather, under *Montana v. United States*, 450 U.S. 544 (1981), it held first that the Tribe possessed regulatory power over *its* lands (W. Pet. 21a), and then concluded that the extension of this authority over the deeded land of non-members was a necessary attribute of the Tribe's sovereignty:

> Further, a major goal of zoning is the "systematic and coordinated utilization of land" in a particular area. N. Williams, *American Land Planning Law*, § 1.06 (1974), *cited in* Comment, 53 Wash. L. Rev. at 679. Comprehensive planning enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern. *Id.* at § 1.08, *cited in* Comment, 53 Wash. L. Rev. at 685. Yakima Nation has exclusive authority to zone tribal trust land which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checkerboard pattern. *If we were to deny Yakima Nation the right to regulate land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do.*

(W. Pet. 23a-24a, emphasis added.)

Following an unsuccessful motion for rehearing and rejection of a suggestion for rehearing en banc, Wilkinson, Brendale, and the County timely filed their petitions for certiorari, which this Court granted on June 20, 1988 and consolidated for review. (Jt. App. 8-10.)

SUMMARY OF ARGUMENT

The Tribe does not possess either inherent sovereign authority or a treaty right to regulate the use of fee land located within the Reservation but owned by non-members of the Tribe.

It does not retain the inherent sovereign authority to regulate non-member fee land because such power poses the potential for an intrusion into the property rights of non-members, who may neither participate in Tribal government nor secure direct judicial review of Tribal land use decisions. Further, the possession of this power is not necessary to the Tribe's political integrity, economic security or health and welfare. *See Montana v. United States*, 450 U.S. 544 (1981). Such a power is, therefore, necessarily inconsistent with the Tribe's status as a "limited sovereign" dependent upon the United States for its existence and powers. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

The Treaty With The Yakima cannot serve as a source of comprehensive Tribal land use authority because the federal policy of land allotment, most clearly embodied in the Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331, *et seq.*, and the evolving demographic characteristics of the Reservation, reveal Congress's intent to preclude Tribal regulatory jurisdiction over non-member fee land. *See Montana v. United States*, 450 U.S. 544 (1981). *Cf. Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (relying on demographic data to support a finding of Congressional intent to disestablish part of a reservation).

In ruling as it has, the Ninth Circuit improperly arrogated to itself the political power to override the intent of Congress's allotment policy and substitute for it the Court's view of the appropriate attributes of Tribal sovereignty. It did so while leaving undisturbed the District

Court's crucial underlying factual findings. The Court, therefore, transgressed both the controlling guidance this Court provided in *Montana v. United States*, and Federal Rule of Civil Procedure 52(a). *Cf. Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 546 (1985) (precluding the unelected federal judiciary from making political judgments about "which policies it favors").

If it is not to be reversed on the aforementioned grounds, the Ninth Circuit's decision must be reversed because of the impact it will have on the constitutional rights of non-members. The Ninth Circuit's decision recognized Tribal power over non-members, who cannot vote in Tribal elections nor obtain direct judicial review of Tribal land use decisions. If the Tribe does possess this authority, it must arise from a post-Allotment Act Congressional delegation. *Montana v. United States*, 450 U.S. at 564. The Constitution prohibits Congress from exercising such power directly. U.S. Const., Amend. V. Neither may it delegate that power to the Tribe. *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (finding state action for purposes of the Fourteenth Amendment).

ARGUMENT

I. NEITHER INHERENT TRIBAL SOVEREIGNTY NOR THE TREATY WITH THE YAKIMA SUPPORT THE YAKIMA INDIAN TRIBE'S CLAIM THAT IT POSSESSES THE POWER TO REGULATE THE USE OF FEE LAND WITHIN THE BOUNDARIES OF ITS RESERVATION WHEN THAT LAND HAS BEEN CONVEYED TO NON-MEMBERS OF THE TRIBE PURSUANT TO THE FEDERAL POLICY OF LAND ALLOTMENT.

A. The Yakima Tribe's Dependent Status Is Necessarily Inconsistent With Retention Of An Inherent Power To Control The Use Of Property Owned In Fee By Non-Members Of The Tribe.

1. *Tribal sovereignty entails only what is necessary for the Tribe to govern its members.*

Indian tribes do not possess the status of full sovereigns. *See* F. Cohen, *Handbook of Federal Indian Law* (1942) at 122.

In *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 561 (1832), Justice Marshall treated the Cherokee Tribe as a distinct nation in which the laws of the State of Georgia could have "no force." This Court has, however, "long ago departed from the 'conceptual clarity of Mr. Chief Justice Marshall's view in Worcester.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983), *quoting*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). *See also Williams v. Lee*, 358 U.S. 217, 219 (1959).

Indeed, despite Chief Justice Marshall's sweeping pronouncement in *Worcester*, this Court has recognized consistently from "the first Indian case to reach this Court," that since their incorporation into these United States "the Indian tribes have lost any 'right of governing every person within their limits except themselves.'" *Montana v. United States*, 450 U.S. 544, 565 (1981), *quoting*,

Fletcher v. Peck, 6 Cranch (10 U.S.) 87, 147 (1810) (Johnson, J., concurring). *See also United States v. Wheeler*, 435 U.S. 313, 323 (1978) (the Tribes's "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.") (Footnote omitted.)

Thus, the "sovereignty that the Indian tribes retain is of a unique and limited character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Indian tribes do not retain those otherwise traditional attributes of sovereignty that have been "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. at 323.

> Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978), *quoting*, *United States v. Kagama*, 118 U.S. 375, 379 (1886).

The implicit limits of Indian sovereignty take shape at the border "between an Indian tribe and nonmembers of the tribe." *United States v. Wheeler*, 435 U.S. at 326. It is at this point that the exercise of tribal authority creates the potential for subversion of what this Court has recognized as the federal government's "great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978).

Judicial vigilance in recognizing the limits of tribal authority over non-members is necessary. The preexisting, sovereign authority that Congress has not taken

from the tribes by treaty or statute is not subject to the constraints of either the Fourteenth Amendment or the Bill of Rights. *See Talton v. Mayes*, 163 U.S. 376 (1896). Tribes maintain their civil immunity from suit. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Those the Tribe regulates possess only a statutory entitlement to certain fundamental rights, and, with the exception of the remedy of habeas corpus, cannot judicially enforce those rights except in Tribal court. *Id.*; 25 U.S.C. §§ 1301-03 (1982). Most importantly, those non-members subject to Tribal power are denied the fundamental democratic safeguard of electoral redress, for they have no voice in selecting those exercising control over their affairs. It necessarily follows that

> The tribes' authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is consistent with the fundamental principle that "in this Nation each sovereign governs only with the consent of the governed." Nevada v. Hall, 440 U.S. 410, 426. Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 172-73 (1982) (Stevens, J., dissenting).

It was this backdrop that informed this Court's analysis in *Montana v. United States*, 450 U.S. 544 (1981). *Cf. McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973) (identifying concepts of Indian sovereignty as the backdrop to determining whether federal interests preempt state law).

In *Montana v. United States*, this Court rejected the Crow Tribe's contention that it retained the inherent sovereign authority to regulate hunting and fishing by non-members on their fee lands located within the Crow Reservation. 450 U.S. at 563-564. The private fee lands

in question constituted 28% of the reservation. *Id.* at 548. In explaining its conclusion, the Court identified several examples of the circumscribed self-governing authority that Indian tribes retain:

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Montana v. United States, 450 U.S. at 564.

In this Court's view, tribal regulation of non-member hunting and fishing on fee-owned lands within the reservation simply bore "no clear relationship to tribal self-government or internal relations." *Id.* (footnote omitted). The Court supported this result by reference to the undisturbed factual findings of the District Court that "the State of Montana has traditionally exercised 'near exclusive' jurisdiction over hunting and fishing on fee lands within the reservation, and that the parties to this case had accommodated themselves to the state regulation." *Id.* at 564, n.13. This Court also relied on the Tribe's failure to show that non-Indian hunting and fishing on the fee land threatened "the subsistence or welfare of the Tribe" or that the State had either abdicated or abused its responsibility for protecting and managing wildlife. *Id.* at 566 & 566 n.16.

In rendering its opinion, the *Montana* Court provided guidelines to be employed in assessing whether a given exercise of tribal authority over non-members should be upheld. The guideline both the Ninth Circuit and the District Court relied upon in resolving this case provides:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 566.

Wilkinson's case turns in part on the foregoing principles.

2. *Tribal authority over the fee land of non-members constitutes an impermissible intrusion into those non-members' civil rights.*

Tribal authority over Wilkinson's fee land undoubtedly creates the potential for an inappropriate intrusion into individual rights. *Cf. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (precluding tribal criminal jurisdiction over non-members). It is clear that zoning is a difficult and politically sensitive matter with serious implications. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. ——, 107 S. Ct. 2378 (1987) (zoning can effect a constitutionally cognizable taking). Thus, it is imperative that those holding the power to make land use decisions be democratically accountable to the people subject to their authority. This Court has long recognized the significant role the political process plays in validating land use controls. *See Village of Euclid v. Ambler Realty*, 272 U.S. 365, 389 & 393 (1926). *Cf. Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live.")

The Ninth Circuit's decision inappropriately creates the potential for significant in-roads into this constitutionally protected interest. The Ninth Circuit's ruling, in deference to *Montana v. United States*, implicitly acknowledges Wilkinson's right to hunt and fish on his land,

but simultaneously creates the possibility that he may be able to use his property for very little else. *Cf.* Tr. 75, 264 (indicating that the land Wilkinson sought to subdivide is not well-suited to agriculture). *See also* Brief of the State of Arizona, *et al.* in Support of Petitions for a Writ of Certiorari at 9. Moreover, the Tribe threatens landowners such as Wilkinson with expulsion from the Reservation—and eviction from their property—if the Tribe views a given land use as "extreme" non-conformance with its code. (Jt. App. 56.)

The Ninth Circuit upheld this Tribal authority under a regime in which Wilkinson is unable either to call the Tribe to account through the electoral process or secure direct judicial review of Tribal land use decisions. (Tr. 169, 158-159; Jt. App. 54; Br. Tr. 184; *supra* at 12, 14-15.) The Ninth Circuit has thus imposed on Wilkinson a second-class citizenship despite his residence within the borders of these United States.

This is the very type of intrusion into the constitutional rights of an American citizen residing within this country that *Oliphant* and *Montana* stress should not be countenanced.

3. *Regulatory authority over non-member fee land is not necessary to the Tribe's political integrity, economic security or health and welfare.*

The District Court characterized the record in *Whiteside II* as providing "no evidence whatsoever" supporting the contention that curtailing Tribal authority in the open area would in any way threaten the Tribe's economic security, political integrity or health and welfare. (W. Pet. 99a.) It thus determined that the Tribe did not possess such authority. (W. Pet. 78a.) This conclusion comports exactly with this Court's view in *Montana v. United States* that absent the *need* for tribal regulation of non-members, no such Tribal power exists. *Montana v. United States*, 450 U.S. at 566.

Essential to this Court's holding in *Montana v. United States* was that the Crow Tribe had not shown regulation of non-members to be critical to the welfare of the tribe. The tribe maintained its security without that asserted power: the reservation remained "livable," the non-member hunting and fishing the tribe sought to regulate did not imperil the tribe's subsistence, and the State had in no fashion "abdicated or abused" its regulatory responsibility. *See Montana v. United States*, 450 U.S. at 566 & ns. 15 & 16. *Cf. Winters v. United States*, 207 U.S. 564 (1908) (recognizing a tribe's retained rights to enough river water to make its reservation livable); *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900, 903 (10th Cir. 1982) (recognizing tribal land use authority over the fee land of non-members in the "absence of any [state] land use control over lands within the Reservation").

The facts of *Whiteside II* show that these criteria foreclose the Tribe's claim to authority over the use of Wilkinson's fee land. The Tribe earns 90% of its income from timber operations in the closed area. To the extent either the Tribe or its members derive income from agriculture in the open area, the District Court determined that the County's code was more protective of that income source than the Tribe's ordinance. (Tr. 122-123; W. Pet. 53a.)

Similarly, the record reflects that the Yakimas are not dependent on a food source that is endangered by County regulation in Wilkinson's case. (W. Pet. 53a.) *Cf. Montana v. United States*, 450 U.S. at 566 (relying on the Crow Tribe's lack of dependence on the wildlife resources the Tribe sought to regulate).

Moreover, rather than abdicating its responsibility, the County has exercised zoning jurisdiction over the open area for the last thirty-five years, a period substantially coextensive with the time during which Yakima County has exercised *any* land use regulation. (W. Pet. 85a,

43a.) (Indeed, prior to this litigation the Tribe has on at least one occasion requested the County approve the use of some of the *Tribe's* Reservation land. (Tr. 455.))

As the facts described indicate, the Tribe's security is not imperiled by the activity it seeks to regulate, and the County of Yakima is actively fulfilling its responsibility to exercise its regulatory power effectively and helpfully. In disregarding these facts the Ninth Circuit has recast the concept of Indian sovereignty in derogation of this Court's decisions, and should be reversed on the basis of *Montana v. United States.*

B. The Federal Policy Of Land Allotment Has Divested The Yakima Tribe Of Any Treaty Right To Regulate The Use Of Non-Member Fee Land Within Its Reservation.

If history had stood still since 1859, the Tribe's former treaty right to exclude non-members from their Reservation might have served to bar non-Indian settlement on the Reservation. *See* W. Pet. 178a. *But see supra* at 6, n. 2 (discussing the Treaty's provision for the federal sale of abandoned allotments). Similarly, if non-members had settled on the Reservation without Congressional authorization, that former Treaty right might now serve as authority for Tribal regulation of non-members' use of fee land. History, however, has not stood still. Congressional action, and the irresistible historical forces that accompanied it, necessarily preclude the Treaty from having this effect today.

This Court has dealt previously with the modern implications of a treaty provision stating, as does Article II of the Treaty With The Yakima, that a reservation was to be "set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit" of the Tribe, and that no white man could reside on the reservation absent Tribal and federal approval. *Compare* Article II of the Treaty of Medicine Creek, 10 Stat. 1132

(1855), *discussed in Puyallup Tribe, Inc. v. Department Of Game Of The State Of Washington*, 433 U.S. 165, 174 (1977), *with*, Article II of the Treaty With The Yakima, W. Pet. 178a. This Court has stressed that the implications of such a provision cannot be divorced from historical fact. *Puyallup Tribe, Inc. v. Department Of Game Of The State of Washington*, 433 U.S. at 174. Rather, "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana v. United States*, 450 U.S. at 561. Abstract reliance on the treaty language of "exclusive use and benefit" can provide "no support" for broad jurisdictional assertions. *Id.*

The history relevant to the interpretation and application of the Treaty With The Yakima is embodied in the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.* ("Allotment Act") (W. Pet. 194a-214a), and the evolving demographic characteristics of the Reservation.

1. *The Allotment Act divested the Tribe of power over non-member owners of fee land.*

It was through implementation of the Allotment Act that the fee land central to this litigation was removed from Tribal trust status and eventually passed into non-Indian ownership. *See generally*, Ex. 248. As discussed below, this Court has clarified beyond all question that Congress passed the Allotment Act intending to divest the tribes of power over the non-member fee holders of allotted land.

The federal allotment policy had as its purpose the assimilation of Indians into the fabric of American society through the "'gradual extinction of Indian reservations and Indian titles.'" *Montana v. United States*, 450 U.S. at 559, n.9, *quoting*, *Draper v. United States*, 164 U.S. 240, 246 (1896). When Congress invited non-Indians to settle on reservations pursuant to this policy,

it clearly intended that those non-Indians would not do so at the expense of subjecting their civil liberties to the authority of an absolute, alien sovereign:

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. . . . *It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.* And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if feeholders could be excluded from fishing or hunting on their acquired property.
>
> The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, at 25 U.S.C. § 461 et seq. *But what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian Treaty rights tied to Indian use and occupation of reservation land.*

450 U.S. at 559, n.9 (emphasis added).

Although federal policy has fluctuated, and allotments are no longer made, the Allotment Act remains unrepealed and the legal consequences flowing from that Act for fee holders are of controlling significance. *See, e.g., Montana v. United States*, 450 U.S. at 557-561.[9] Those

---

[9] This comports with the Court's repeatedly emphasized observation that the character and source of land tenure should have enduring implications for the exercise of tribal and state regulatory authority. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331 (1983) (distinguishing *Montana v. United States*, on the basis that *Montana v. United States* "concerned lands located within the reservation but *not* owned by the Tribe or its members").

consequences are that non-member owners of fee land within a reservation are, pursuant to Congressional intent, *not* subject to tribal land use regulation. *See Montana v. United States*, 450 U.S. at 558-561.[10] Once implemented, the allotment policy intentionally generated federally-based expectations of freedom from tribal authority that cannot be judicially extinguished. *Id.*[11]

---

[10] Even one of the recent Congressional enactments that the Tribe relied on below confirms the continuing importance of the distinction between fee and trust land on a reservation. *See, e.g.*, 25 U.S.C. § 450 *et seq.* (1982 and Supp. III 1985), which, in the Ninth Circuit's words in this case, "authorizes the Secretary of the Interior, upon a tribe's request, to enter into a contract with the tribe, to reallocate management of land use programs involving *trust land, including zoning*, from the federal government to the tribe." (W. Pet. 15a, emphasis added.)

[11] The Yakima Land Purchase Act, c. 423, 69 Stat. 392, as amended, 25 U.S.C. § 608(a)(1), and the Tribe's expenditure, with federal approval, of $54 million to reacquire fee land, provide a specific illustration that Congress has not attempted to repudiate the implications for individuals of land ownership arising from the allotment process. The Act provides for the Secretary of the Interior to

> purchase for the Yakima Tribes, with any funds of such tribes, and to otherwise acquire by gift, exchange, or relinquishment, any lands or interest in lands or improvements thereon within the Yakima Indian Reservation or within the area ceded to the United States by the treaty of June 9, 1855
>
> . . .

In this manner, Congress showed its intent that Tribal control over fee land should be accomplished by the land's repurchase and resumption of trust status. *See* Letter, dated May 3, 1955, of F.G. Aandahl, Assistant Secretary of the Interior, to James E. Murray, Chairman, Committee on Indian and Insular Affairs, United States Senate (land repurchase would lead to "the eventual assumption by these Indian people of the management of their own affairs"), written in support of S. 1603, *reprinted in* S. Rpt. No. 847, 84th Cong., 1st Sess. *See also* Tr. 110 (Tribal Council Member Washines discussing the Tribe's expenditure of $54 million to reacquire fee land and return it to trust status). *Cf.* Tr. 317 (Tribal member Saluskin discussing the importance of a provision for the Tribe's

2. *The Reservation's demographic characteristics illustrate Congress's intent to displace tribal authority over allotted, non-member fee land.*

Congress's intent to free non-member fee holders from tribal jurisdiction over land use is further evidenced by the demographic characteristics of the open area. This Court has recognized in the analogous context of Congressional diminishment of reservations that the "subsequent demographic history of opened lands" may serve as a "clue", albeit an imperfect one, "to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Solem v. Bartlett*, 465 U.S. 463, 471-472 & n.13 (1984) (footnote omitted). *See also Id.*, at 471 ("On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the open portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603-605 (1977); *DeCoteau v. District County Court For The Tenth Judicial District*, 420 U.S. 425, 442-443 (1975).

In this case, the District Court explicitly recognized the importance of these considerations when he stated, referring to a BIA map of the Reservation showing the pattern of land ownership, that

> Exhibit No. 200 reflects exactly the history of the dealings by the United States' Government with the Indian People, the result being the factual situation with which I must deal; to-wit, a substantial portion of the Open Area of the Yakima Indian Nation being held in fee rather than being held in trust for the

---

reacquisition of land.) Simply put, the Tribe inappropriately seeks to obtain through regulation a power over land Congress intended for it to possess only through repurchase.

benefit of the peoples of the Yakima Indian Nation as was intended in the Treaty of 1855.

(W. Pet. 91a-92a; Ex. 200, Jt. App. 79.) This observation is clearly supported by the evidence of record: almost one-half the acreage in the open area is held in fee by non-members, while non-members comprise 80% of that region's population (W. Pet. 40a, 51a); non-members farm 130,645 of the open area's 143,000 irrigated acres; (Tr. 422 & 418); there are three incorporated municipalities with a combined population of over 10,000 in the open area (W. Pet. 51a); and, the County has exercised land use jurisdiction over this area for thirty-five years (W. Pet. 85a.). The record shows that these statistics are the direct result of the allotment policy. (Ex. 248.)

In *Rosebud Sioux Tribe v. Kneip*, analogous facts proved adequate to confirm Congress's intent to *disestablish* a portion of an Indian reservation: "The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges." 430 U.S. at 604-605 (footnote omitted). *See also Solem v. Bartlett*, 465 U.S. at 479-480. The demographics of the open area, read in light of the unmistakable intent of the Allotment Act, mandate the conclusion that Wilkinson's fee land is not subject to the Tribe's land use regulation.

3. *The Ninth Circuit's decision ignores the allotment policy and turns on inappropriately political considerations.*

At the core of the Ninth Circuit's decision is a troubling willingness to engage in a revisionist exercise. The Ninth Circuit ignored the factual predicates of the District Court's analysis, Congress's intent in its allotment

policy, and this Court's reading of that Congressional intent, in reaching its determination that comprehensive zoning authority was a necessary attribute of the Tribe's authority. The Ninth Circuit's decision reflects its assessment that history and Congress's intent should yield to the Ninth Circuit's judgment that checkerboard Tribe-County zoning jurisdiction is inappropriate. (W. Pet. 23a-24a.) That, however, is a *political* question. *Cf. Luther v. Borden*, 7 How. (48 U.S.) 1 (1849) (the Constitutional guaranty, in Art. IV, § 4, of a republican form of government poses a political question).

The Ninth Circuit's approach is reminiscent of the "unsound" and "unworkable" judicial assessments of State sovereignty jettisoned in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 546 (1985). To paraphrase *Garcia* and analogize it to this case, *Montana v. United States* is not properly viewed as an invitation to "an unelected federal judiciary to make decisions about which . . . policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. at 546. If uncorrected, the Ninth Circuit's approach will transform *Montana v. United States* into a vehicle for the expression of overtly political judgments that are properly within the domain of Congress.

The record below shows that checkerboard jurisdiction over land use is commonplace. (Tr. 469-471; Ex. 246, Tr. 470, 471. *Cf.* Br. Tr. 491—the County regulates the fee land contained within the boundaries of federal enclaves, such as the national forest, within Yakima County.) Further, the District Court determined, contrary to the Tribe's theoretical objections, that such a scheme is oftentimes necessitated by modern conditions and is neither impossible nor difficult to administer. (W. Pet. 97a.)

The impermissibly political character of the Ninth Circuit's decision to disregard these observations is evidenced

by this Court's holding that the checkerboard pattern of jurisdiction on the Yakima Reservation is legally unobjectionable. This Court has stated in regard to the very Reservation here in question that "classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States." *Washington v. Confederated Bands And Tribes Of The Yakima Indian Nation*, 439 U.S. 463, 501 (1979).[12]

In essence, the Ninth Circuit embraced the Tribe's invitation to turn back the legacy of the allotment policy. (Tr. 301, 318.) The Ninth Circuit did what the District Court properly refrained from doing. (W. Pet. 96a, 98a, 101a; *supra* at 20-21.) Such a decision is not one for the Ninth Circuit to make. Congress has spoken. Many of Yakima County's citizens have accepted Congress's invitation. As this Court has stated, "[s]ome might wish [Congress] had spoken differently, but we cannot remake history." *DeCoteau v. District County Court For The Tenth Judicial District*, 420 U.S. at 449.[13]

---

[12] Neither *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), nor *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) are to the contrary. Those cases establish that Congress did not envision a scheme of checkerboard jurisdiction over *tribal members* based *solely* upon the character of land tenure within a reservation. The later case of *Montana v. United States*, demonstrates that neither *Moe* nor *Seymour* speak to the question of the efficacy of a system of checkerboard jurisdiction implicating the rights of *non-members* of a tribe. Rather, *Montana v. United States, requires* the approval of such a jurisdictional structure if the non-members own reservation fee land pursuant to the federal allotment policy. Indeed, *Moe* allowed the State of Montana to require a *tribal member* to collect a state tax on a transaction occurring within the reservation when the transaction was the Indian sale of cigarettes to non-members of the Tribe. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservations*, 425 U.S. at 481-483.

[13] *Cf. United States v. Sioux Nation of Indians*, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting) ("[t]hat there was tragedy,

C. The Ninth Circuit Proceeded Improperly Under Federal Rule Of Civil Procedure 52(a) When It Independently Redetermined Whether The Tribe Possessed Authority Over The Use Of Non-Member Fee Land Within The Reservation.

In reaching its conclusion in *Whiteside II*, the District Court found:

> 9. In part due to the parcel size requirements of the county's "exclusive" and "general" agriculture zones, *i.e.*, 40 and 20 acres respectively, the Yakima County zoning scheme is more protective of the Open Area's agricultural lands than the Yakima Nation's "agricultural" use district which allows agricultural land to be divided into 5-acre lots.
>
> 10. The trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Yakima Nation. The proposed Wilkinson development does not threaten a food source of members of the Yakima Nation.
>
> 11. Similarly, the Wilkinson project does not threaten the economic security of the Yakima Nation. The plaintiff has not demonstrated how Yakima County's regulation of the land use of Wilkinson's "Open Area" property in any way places its economic security in jeopardy.

(W. Pet. 53a.)

The Ninth Circuit acknowledged that the District Court's findings were subject only to the deferential scrutiny authorized by Fed. R. Civ. P. 52(a) (W. Pet. 25a), which provides that such findings "shall not bet set aside unless clearly erroneous." Fed. R. Civ. P. 52(a). It then

---

deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied. But in a Court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: 'Judge not, that ye be not judged' ").

reached its decision that the Tribe possessed regulatory authority over Wilkinson's land while leaving undisturbed these findings of fact.

This Court has been clear that Rule 52(a) "means what is says." *Bose Corporation v. Consumers Union Of United States, Inc.*, 466 U.S. 485, 498 (1984).

The rule did not deter the Ninth Circuit. Despite the District Court's findings, the Ninth Circuit simply "would have decided the case differently." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985). In disregard of the facts, it believed, on the basis of an overtly political assessment of the nature of "sovereignty," that the Tribe was threatened if it did not have power over land neither it nor its members owned. By so ruling the Ninth Circuit violated the command of Rule 52(a), and therefore should be reversed.

II. THE NINTH CIRCUIT'S DECISION SHOULD BE REVERSED BECAUSE IT SANCTIONS A DELEGATION OF UNCONSTITUTIONAL AUTHORITY OVER NON-MEMBERS OF THE TRIBE.

Given the foregoing, the Ninth Circuit's decision can only be affirmed on the basis of a Congressional delegation to the Tribe of authority over the constitutionally protected interests of non-members, when that Tribal authority is immune from both legislative redress and direct judicial review.

This Court has twice noted, but has thus far not addressed squarely, the question of whether the federal government may, in light of the constraints of the Fifth Amendment to the United States Constitution, delegate to an Indian Tribe power over American citizens that Congress would be constitutionally prohibited from assuming directly. *See United States v. Wheeler*, 435 U.S. 313, 328 n.28 (1978); *United States v. Mazurie*, 419 U.S. 544, 558 n.12 (1975) ("[w]hether and to what extent the Fifth Amendment would be available to correct arbitrary or discriminatory tribal exercise of its delegated federal authority must therefore await decision in a case in which the issue is squarely presented and appropriately briefed"). If this Court determines that the Federal Government's post-Allotment Act "policy of encouraging tribal self-government", *Iowa Mutual Insurance Company v. La Plante*, 480 U.S. 9, 107 S. Ct. 971, 975 (1987), has reposited in the Tribe the power it seeks here, it has made resolution of that question inevitable.

The authority the Tribe claims in regard to Wilkinson's property is one that concerns him "upon individual grounds," *Bi-Metallic Company v. Colorado*, 239 U.S. 441, 446 (1915), and touches a protectable property interest. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. ——, 107 S. Ct. 2378 (1987). Thus, Wilkinson's due process rights are implicated. *See, e.g., Londoner v. Denver*, 210 U.S. 373 (1908). Of even more fundamental importance, Wilkinson has a constitutional entitlement to participate in selecting those exercising governmental power over his property. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). *Cf. Village of Euclid v. Ambler Realty*, 272 U.S. 365, 389, 393 (1926) (the electoral process legitimizes governmental land use controls).

Congress may not exercise its authority to the detriment of either of these Constitutional safeguards. U.S. Const., Amend. V. Nor may it elude these constraints through delegation. *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (finding state action for Fourteenth Amendment purposes).

Under the Ninth Circuit's decision, however, Congress has necessarily transgressed these prohibitions.

First, Wilkinson's constitutional rights are imperiled. Wilkinson's property is subject to comprehensive Tribal regulation yet he cannot participate in Tribal elections. Thus, he is denied the fundamental right to participate in

the government whose laws he must obey. *Wesberry v. Sanders*, 376 U.S. at 17. Further, the Tribe precludes all direct judicial review of its land use decisions, (Br. Tr. 184), and expressly asserts immunity from suit. (Jt. App. 54). Therefore, he cannot secure adequate judicial review of Tribal zoning determinations. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 (9th Cir. 1980); *R.J. Williams Company v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985). *But see Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981) (providing a federal court remedy for a non-Indian denied access to tribal court).

Second, this situation could only come to pass pursuant to Congress's will. *All* aspects of tribal sovereignty are "subject to plenary federal control and definition." *Three Affiliated Tribes Of The Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 106 S. Ct. 2305, 2313 (1986). *See also National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845, 857 (1985) (the existence of tribal court jurisdiction presents a federal question within the scope of 28 U.S.C. § 1331); *Montana v. United States*, 450 U.S. at 564 (tribes possess power inconsistent with their dependent status only with "express congressional delegation").

The Fifth Amendment necessarily precludes such a delegation; for this reason the Ninth Circuit's decision cannot be sustained.[14]

---

[14] Reversal of the Ninth Circuit's decision on the basis of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *Montana v. United States*, 450 U.S. 544 (1981) would simultaneously clarify this area of the law and avoid resolving this difficult and unnecessary constitutional question. *Cf. Lyng v. Northwest Indian Cemetery Protective Association*, 108 S. Ct. 1319, 1323-1324 (1988) (advising resolution of a controversy without needlessly confronting a Constitutional question), *citing, inter alia, Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). That is the course this Court should pursue.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded with directions to enter an order that the County of Yakima possesses exclusive authority to regulate the use of non-member fee land within the boundary of the Reservation. Alternatively, Wilkinson urges that insofar as the Court of Appeals reversed the District Court's judgment in *Whiteside II*, the Ninth Circuit's decision should be reversed, and the case remanded with directions to enter an order declaring that the County of Yakima possesses exclusive authority to regulate the use of non-member fee land within the open area of the Reservation.

Respectfully submitted,

DALE B. RAMERMAN *
RONALD T. SCHAPS
MICHAEL MIRANDE
BOGLE & GATES
2300 Bank of California Ctr.
Seattle, WA 98164
(206) 682-5151
Counsel for Petitioner
Stanley Wilkinson

* Counsel of Record

September 1, 1988